No. 76-226

In the Supreme Court of the United States

OCTOBER TERM, 1976

In re CRATEO, INC.,

Bankrupt,

CRATEO, INC.,

Petitioner,

v.

INTERMARK, INC., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Respondents, Intermark, Inc., et al., respectfully pray that the United States Supreme Court deny the petition of Crateo, Inc. ("Crateo") for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 536 F.2d 862 and is contained in Appendix A. No written opinion was rendered by the District Court. However, it adopted the written opinion of the Special Master, who had been appointed by the District Court.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 27, 1976, affirming a judgment of the United States District Court for the Southern District of California dated August 7, 1973. The United States Court of Appeals for the Ninth Circuit denied a petition for rehearing on June 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

Bankruptcy Act Section 3a(5) [11 U.S.C. Section 21a(5)]:

> "a. Acts of bankruptcy by a person shall consist of his having. . . .
>
> (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver to take charge of his property."

QUESTIONS PRESENTED

1. Did Crateo, a corporation, commit the fifth act of bankruptcy within the meaning of Section 3a(5) of the Bankruptcy Act: (1) by filing a petition for judicial supervision of the winding up of its affairs pursuant to Sections 4607 and 4616 of the

California Corporations Code; (2) where the state Superior Court stayed all actions by creditors against Crateo and required its creditors' claims to be proved and presented to the Superior Court; and (3) where a jury determined that Crateo was unable to pay its debts as they matured?

2. Does a holding that the actions listed in Question 1 constitute the fifth act of bankruptcy in any way violate the constitutional rights of Crateo's directors or shareholders, or does it deny Crateo's creditors the protection they are to be afforded under the Bankruptcy Act?

3. Did the Ninth Circuit Court of Appeals error in considering Crateo's liability on the Texas judgment relevant to Crateo's ability to pay its debts as they matured, even though Crateo alleged that the judgment was subject to attack for extrinsic fraud?

4. Did the Ninth Circuit Court of Appeals error in refusing to allow Crateo to collaterally attack, for alleged extrinsic fraud, a judgment rendered in the Southern District of Texas and affirmed by the United States Court of Appeals for the Fifth Circuit where: (1) Crateo had not sought to set aside the judgment in the Court which rendered the judgment, and (2) where Crateo could offer no satisfactory explanation for its failure to raise the issue of the alleged extrinsic fraud for over two years?

5. Was the statutory right to a jury trial denied to Crateo where a Special Master was appointed to evaluate the complex financial situation of the bankrupt pursuant to Federal Rule 53; where the findings of the Special Master were read to the jury by the Judge; and where Crateo did not object to the use of the Special Master until after the Special Master had made a determination of preliminary issues adverse to the Petitioner?

6. Is liability on a stipulated judgment a "fixed liability," and thus a provable claim within the meaning of Section 63(a) of the Bankruptcy Act?

STATEMENT OF THE CASE

This case involves an involuntary bankruptcy proceeding brought by a number of creditors to have the Petitioner, Crateo, a California corporation, adjudicated a bankrupt. The Respondent petitioning creditors have heretofore successfully asserted that Crateo committed the fifth act of bankruptcy set forth in Section 3a(5) of the Bankruptcy Act [11 U.S.C. Section 21(a)(5). Hereinafter referred to merely as "Section 3a(5) of the Bankruptcy Act."] and should be adjudicated a bankrupt.

On August 31, 1970, Crateo filed with the San Diego County Superior Court a Petition for Judicial Supervision of the Winding Up of its affairs pursuant to the provisions of Sections 4607 and 4616 of the California Corporations Code. Crateo's Petition alleged that it was subject to a great volume of litigation from creditors and it sought the Superior Court's umbrella of protection in the form of a stay of existing lawsuits and an order requiring creditors to file claims in the dissolution proceeding. On the same day, the Superior Court issued its order requiring all creditors to submit claims to the Court's clerk on or before March 30, 1971. The order also provided as follows:

> "All creditors and claimants against Crateo, Inc., are hereby enjoined and stayed from prosecuting any suit, proceeding, or action against Crateo, Inc., and are required to present and prove their claims in the manner required of creditors."

All persons with claims against Crateo were thus foreclosed from pursuing their normal remedies against Crateo and were required to appear and present their claims to the Superior Court.

The creditors' petition was filed on September 18, 1970, and an amended petition was filed on September 21, 1970.

Crateo filed its answer and demanded a jury trial. Because the proceeding involved complex issues of fact and law, on May 24, 1971, the Honorable Howard B. Turrentine, United States District Court Judge, appointed Charles M. Fox, Jr., a Referee in Bankruptcy, to sit as a Special Master in accordance with Rule 53 of the Federal Rules of Civil Procedure. Referee Fox held a number of hearings during which evidence was received and thereafter submitted to the District Court four reports, all favorable to petitioning creditors' positions. Judge Turrentine, after considering Crateo's objections, adopted the first three reports which dealt with non-jury issues. Portions of the fourth report were read into evidence by Judge Turrentine at the jury trial. On June 13, 1973, the jury returned a verdict that Crateo was unable to pay its debts as they matured as of August 31, 1970. A judgment adjudicating Crateo a bankrupt was entered on August 9, 1973. Crateo appealed this judgment to the Ninth Circuit Court of Appeals [No. 73-3208].

After filing an appeal with the Ninth Circuit Court of Appeals from the District Court's decision adjudicating it a bankrupt, Crateo filed a motion in the District Court pursuant to Rule 27(b) of the Federal Rules of Civil Procedure requesting leave to take depositions to perpetuate testimony pending appeal. The District Court denied that motion [No. 74-2088] and an appeal of that denial was docketed with the Ninth Circuit Court of Appeals as No. 74-2088. Subsequently, on April 4, 1974, Crateo filed a motion with the District Court designated "Motion to Set Aside Judgment Based on Newly Discovered Evidence" [F.R.C.P. Rule 60(b)]. [No. 74-2615]. The motion was denied by the District Court and appeal No. 74-2615 followed. On May 27, 1976, the Ninth Circuit Court of Appeals affirmed all of the decisions of the District Court which Crateo had appealed.

REASONS WHY THIS COURT SHOULD DENY THE WRIT

Rule 19 of this Court sets forth the character of reasons which will be considered by it in reviewing on a Petition for a Writ of Certiorari. Petitioner argues in its petition that this case presents factors which justify such a review. As the discussion which follows will conclusively demonstrate, none of the special and important reasons set forth in Rule 19 for a review on Writ of Certiorari are herein present; the United States District Court for the Southern District of California and the Ninth Circuit Court of Appeals have examined this case in great detail, and have ruled correctly on all of the issues presented. Therefore, a review of this case on Writ of Certiorari by this Court would be inappropriate. Respondent sets forth the reasons why the assertions of Crateo are without merit and the reasons why these assertions do not satisfy the criteria of Rule 19 for review on Writ of Certiorari.

I

There is No Conflict Between the Ninth and Second Circuits Over What Constitutes the Fifth Act of Bankruptcy.

Petitioner has attempted to characterize a conflict between the decision in *Blair & Co., Inc. v. Foley*, 471 F.2d 178 (2d Cir. 1972), *vacated and remanded for consideration of mootness*, 414 U.S. 212, 94 S.Ct. 405, 38 L.Ed.2d 422 (1973), and the decision of the Ninth Circuit Court of Appeals here. As the citation to *Blair* indicates, the Second Circuit decision was vacated by this Court and, having been vacated, cannot be considered to conflict with the Ninth Circuit decision here. In any event, the Second Circuit decision in *Blair* is consistent with the Ninth Circuit's decision here. Both cases dealt with the question of what constitutes the fifth act of bankruptcy within the meaning of Section 3a(5) of the Bankruptcy Act. *Blair* involved the

question of whether the fifth act of bankruptcy had taken place by the appointment of a "liquidator" for Blair & Co., Inc. pursuant to an agreement between it, the New York Stock Exchange and others. The Liquidator was appointed pursuant to a *private agreement* and was authorized to take control of the business and property of Blair for the purpose of its liquidation. The Liquidator was not endowed with the authority to restrain creditors nor to adjudicate claims of creditors. The liquidation process was an informal one worked out by Blair and the New York Stock Exchange; Blair's creditors were not parties to nor bound by the agreement.

The circumstances of the instant case were significantly different: Crateo sought the aid of California's dissolution statutes and requested and received Court supervision and protection of the dissolution process. Crateo's creditors were enjoined from pursuing their normal remedies and instead were forced to present and prove their claims before the Superior Court. Moreover, in winding up Crateo's affairs, the first duty of its directors became satisfying the corporation's debts and liabilities. Calif. Corp. Code Section 5000.

The Ninth Circuit Court of Appeals considered the private arrangement examined in *Blair* clearly distinguishable from the Court supervised dissolution proceeding here:

> "*Blair & Co., Inc. v. Foley* . . . is not to the contrary. That case involved a private arrangement between a brokerage firm and the New York Stock Exchange for the appointment of a liquidating agent for the firm. *No Court was involved in the liquidation process nor did the winding up process force creditors to forego their normal legal remedies. In light of the different factual situations herein, we*

need not comment further on the Blair case." (536 F.2d at 866, n. 4. Emphasis added.)

Moreover, the Second Circuit in *Blair* explicitly recognized the significance of a Court supervised dissolution proceeding to the fifth act of Bankruptcy by observing the "obvious correctness" of the decision in *In re Bonnie Classics, Inc.*, 116 F.Supp. 646 (S.D.N.Y. 1953). The court in *In re Bonnie Classics* had held that the filing of a certificate of dissolution with the state Court under the then Section 105 of the New York Stock Corporation Law was an act of bankruptcy under Section 3a(5). (See *Blair* at 471 F.2d 178, 181.)

To summarize, even assuming the viability of the Second Circuit's decision in *Blair*, there is no conflict between the Second and Ninth Circuit Courts of Appeal as to that which constitutes the fifth act of bankruptcy. Neither Court has held that a private arrangement between the debtor and creditors satisfies Section 3a(5). However, both Circuits have recognized that a state Court supervised dissolution proceeding can constitute the fifth act of bankruptcy. The decision of the Second Circuit in *Blair* suggests that its decision in the instant case would have been identical to that of the Ninth Circuit.

II

The Decision of the Ninth Circuit Finding Crateo's Voluntary Invocation of the State Corporate Dissolution Scheme to be Tantamount to the Appointment of a Receiver or Trustee Within the Meaning of Section 3a(5) of the Bankruptcy Act Raises No Significant Constitutional Issue.

Crateo has sought to characterize the decision of the Ninth Circuit as "imposing" duties upon its directors and as "depriving" rights of its shareholders without their receiving notice and a hearing. This characterization is a total misdescription of the nature of the actions taken by Crateo through its board of directors. Moreover, Crateo did not raise this argument in the Courts below, and thus this Court should not consider it for that reason -- "We cannot decide issues raised for the first time here." *Tacon v. Arizona*, 410 U.S. 351, 352, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973).

It is important to note that the Ninth Circuit did not impose duties upon the directors, they did so themselves by *voluntarily* seeking the aid of the Superior Court and California's corporation dissolution scheme. It was the invoking of this judicial and statutory protection by Crateo which the Ninth Circuit analyzed in concluding that the circumstances and the duties under state law to which Crateo's directors had voluntarily become subject were tantamount to the appointment of a trustee or receiver within the meaning of Section 3a(5) of the Bankruptcy Act.

Once it is understood that Crateo's directors and shareholders voluntarily assumed certain duties under State law in return for certain statutory and judicial benefits, it becomes clear that the subsidiary contentions of Crateo in its second argument are insubstantial and without merit:

1. Crateo's directors' fiduciary duties to its creditors were not imposed upon the directors without due process, because the directors themselves created any new duties they had to the creditors by *voluntarily* filing the petition for dissolution and seeking court protection.

2. Crateo's directors were not forced into the involuntary servitude of its creditors, because the directors *voluntarily* filed the petition for dissolution and thereby *voluntarily* assumed any new duties they had under state law to the corporation's creditors.

3. Crateo's shareholders were not deprived of control of the corporation without due process, because the directors, on the shareholders' behalf, voluntarily instituted the dissolution proceedings.

4. Crateo gratuitously seeks to allege on behalf of the Respondent creditors herein that the creditors' statutory right to appoint the trustee in bankruptcy was violated. The creditors have, of course, been attempting for the past six years to have Crateo finally adjudicated a bankrupt so that, among other things, an independent trustee in bankruptcy could be appointed. Crateo's argument on this point confuses the term "trustee" as used in Section 3a(5) with the term "trustee" in bankruptcy as used in Section 44 (11 U.S.C. Section 72).

Also important is the fact that Crateo has no standing to assert an alleged violation of Respondent's rights and thus Crateo's contentions under its second argument should not be considered for this reason. *NAACP v. Alabama*, 357 U.S. 449, 459, 2 L.Ed.2d 1488, 1497-1498, 78 S.Ct. 1163 (1958); *Griswold v. Connecticut*, 381 U.S. 479, 481, 14 L.Ed.2d 510, 512-513, 85 S.Ct. 1678 (1965).

5. Crateo's directors were not placed in civil jeopardy for violation of state law. The California Civil Code and the

relevant provisions of the California Corporations Code must be read together. Obviously, if the directors were acting in accordance with the Corporations Code and with the blessing of the Superior Court, they would not be deemed to be violating the California Civil Code. Moreover, this alleged inconsistency between California statutes obviously does not present an important question for Supreme Court review within the scope of Rule 19.

III

The Ninth Circuit Court of Appeal's Decision Here Does Not Conflict with the Decision of the Eighth Circuit Regarding a Disinterested Trustee.

In *R. J. Reynolds Tobacco Company, et al. v. A. B. Jones Co., Inc., et al.*, 54 F.2d 329 (1931) the Eighth Circuit Court of Appeals held that the determination of whether a receiver was suitable or not was within the discretion of the bankruptcy court. The underlying theory of the Court there was that the creditors were entitled to have an impartial trustee so that their rights would be protected. Here, the policy objective articulated in *R. J. Reynolds* was satisfied, because of the strict supervisory powers of the Superior Court during the dissolution proceeding and because Crateo's directors had a primary duty to its creditors.

Crateo again confuses the concept of a "trustee" as used in Section 3a(5) with the concept of "trustee" in bankruptcy as used in Section 44 of the Bankruptcy Act [11 U.S.C. Section 72]. *R. J. Reynolds Tobacco Co.'s* discussion of a disinterested "receiver" was in the context of the type of functions contemplated under Section 44. That case did not discuss the functions of a disinterested receiver within the meaning of Section 3a(5) of the Bankruptcy Act.

The Court should note that through Crateo's third argument, it again seeks to gratuitously assert the rights of the

Respondents rather than its own, and again it is clear that Crateo is without standing to do so. *NAACP v. Alabama*, 357 U.S. 449, 459, 2 L.Ed.2d 1488, 1497-1498, 78 S.Ct. 1163 (1958), *Griswold v. Connecticut*, 381 U.S. 479, 481, 14 L.Ed.2d 510, 512-513, 85 S.Ct. 1678 (1965). Also, Crateo did not raise this third argument in the Courts below, and thus for that reason this Court should not consider it. *Tacon v. Arizona, supra.*

IV

The Ninth Circuit Court of Appeal's Decision Denying Crateo's Motion to Collaterally Attack the Judgment of the District Court in Texas Did Not Violate the Rule Set Forth in Hazel Atlas Co. v. Hartford Co.

Crateo argues that the Ninth Circuit has allowed Respondents to benefit from another's fraud, and that by so doing the Ninth Circuit has violated the principle set forth in *Hazel Atlas Co. v. Hartford Co.*, 322 U.S. 238, 88 Law Ed. 250, 64 S.Ct. 997 (1944). That case involved the power of a Circuit Court, upon proof that fraud was perpetrated on *it* by a successful litigant, to vacate its own judgment entered at a prior term. The Supreme Court there held that in certain circumstances a Circuit Court of Appeals does have such power. The Court stated, however, that this power must be used cautiously because of the salutary rule that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.

The rule of *Hazel Atlas* is not apposite in the instant case: Crateo did not ask the Ninth Circuit Court of Appeals to overturn a judgment rendered in *its Circuit* which had been allegedly procured by fraud. Crateo asked the Ninth Circuit to overturn *another* Circuit's judgment. The Ninth Circuit refused, finding that Crateo had come to the wrong forum. Moreover, Crateo

could not explain satisfactorily the reason for its delay of two and a half years in raising the issue of the use of alleged extrinsic fraud in procuring the judgment.

V

Petitioner Was Not Denied Due Process By Being Required To Attack The Texas Judgment In The Texas Rendering Court.

An argument that due process is violated by requiring a litigant to attack a judgment procured by alleged extrinsic fraud in the rendering court strains credulity. It is usually the rendering court which is most familiar with the facts of the case, and it is the rendering court which has the strongest interest in ensuring that fraud has not been perpetrated upon it. The Ninth Circuit's decision requiring Crateo to go to the rendering court to attack the judgment not only comported with fundamental notions of fair play, but it was clearly the most appropriate disposition of the matter.

Again Crateo seeks to assert an argument it did not raise in the Courts below, and thus again this Court should refuse to consider it.

VI

The Use Of A Special Master Pursuant To Rule 53 Of The Federal Rules Of Civil Procedure Did Not Impair Crateo's Statutory Right To A Jury Trial.

Crateo contends that the appointment of the Special Master and the reading of his report to the jury impaired its right to a jury trial as granted by the Bankruptcy Act in Section 19(a) [11 U.S.C. Section 42a]. By acquiescing in the appointment of the Special Master and by participating in proceedings

beforehand prior to raising any objections, Crateo waived any basis it may have had to object to the reference. In any event, the complexity of the case dictated the appointment of the Special Master. Crateo's attack is, in essence, an attack on the entire concept of a Special Master and would require the overruling of well established authorities sanctioning the use of Special Masters in jury trials. *E.g., In re Peterson,* 253 U.S. 300, 64 L.Ed. 919, 40 S.Ct. 543 (1920).

Crateo also contends that the District Court erred in reading the Special Master's report itself rather than having the Special Master read his own report. Rule 53(e)(3) makes clear that the Special Master's findings "may be read to the jury"; there is no requirement that the findings be read by the Special Master himself.

VII

The Ninth Circuit's Opinion Has Not Given Rise To A Serious Question Of Statutory Interpretation Regarding The Phrase "Inability To Pay Debts As They Mature."

Intermark Investing Inc. was a judgment creditor of Crateo's pursuant to a stipulated judgment entered in a state court prior to the filing of the creditors' petition. Part of the judgment provided that two parcels of property owned by Crateo would be sold and the proceeds of the sale applied to reduce Crateo's debts to Intermark. A dispute allegedly arose over the manner in which the properties were to be appraised prior to their sale. The Ninth Circuit found that:

> "This was essentially a dispute over the manner in which the judgment would be satisfied and cannot obscure the fact that Crateo's liability to Intermark had already become *fixed. In re Trimble Co.,* 339 F.2d 828, 844 (3rd Cir. 1964)". (536 F.2d at 867. Emphasis added.)

The Ninth Circuit here was obviously holding that Crateo had a "fixed liability" to Intermark within the meaning of Section 63(a) of the Bankruptcy Act [11 U.S.C. Section 103a]. Intermark's claim against Crateo was thus "provable" and hence Intermark qualified as a creditor which could petition for an involuntary bankruptcy of Crateo under Section 59(b) of the Bankruptcy Act [11 U.S.C. Section 95b]. This logical statutory interpretation, which was consistent with *In re Trimble Co.* cited by the Ninth Circuit, clearly raises no serious question of statutory interpretation and is not in conflict with decisions of the Second Circuit.

VIII

The Ninth Circuit's Decision Below, If Allowed To Stand, Will Not Destroy California's Statutory Scheme Of Voluntary Dissolution Of Corporations.

The Ninth Circuit's opinion effectively refutes the eighth argument in Crateo's petition:

> "Not every corporate petition for dissolution under the California Corporations Code will necessarily result in an involuntary bankruptcy. Under 11 U.S.C. Section 21(a)(5), the creditors must also show that the debtor was 'insolvent or unable to pay his debts as they mature.' *However, if this situation exists, California Corporations cannot defeat the operations of the bankruptcy laws by applying for dissolution under California law. In re Watts and Sachs,* 190 U.S. 1, 27 (1902). The overly technical approach to the interpretation of 11 U.S.C. Section 21(a)(5) urged by Crateo must be rejected." (536 F.2d at 866-867. Emphasis added.)

CONCLUSION

The relevant legal issues presented in this case have, over the past six years, been explored fully by the Special Master, the United States District Court for the Southern District of California, and the Ninth Circuit Court of Appeals. After a detailed examination of these issues, these tribunals have appropriately found the relevant contentions raised by Crateo in its instant petition to be without merit. A reading of Crateo's petition and this brief in opposition thereto conclusively demonstrates that Crateo has not set forth any appropriate reasons for a review of this case on Writ of Certiorari by this Court.

Therefore, this Court should refuse to grant the Writ of Certiorari for which Crateo has petitioned.

Respectfully submitted,

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APPENDICES

A-1

In re Crateo, Inc., Bankrupt.

CRATEO, INC., Appellant,

v.

INTERMARK, INC., et al., Appellees.

Nos. 73-3208, 74-2088, 74-2615
and 75-3061.

United States Court of Appeals,
Ninth Circuit

May 27, 1976.

Rehearing Denied June 28, 1976.

A debtor corporation was adjudicated bankrupt, and appealed. Appeals were taken also from the denial of post-judgment motions by the United States District Court for the Southern District of California, Howard B. Turrentine, J. The Court of Appeals, Wollenberg, District Judge, sitting by designation, held that there was no error in reference to a special master, and the debtor received a fair and proper trial on the question of insolvency, with the use of a proper standard of what constitutes insolvency. The debtor's challenge to a Texas judgment was brought in the wrong forum. Where the debtor could not properly have attacked such a judgment collaterally, a motion to take a deposition for such purpose was properly denied.

Judgment in one case and order in another affirmed; other appeals dismissed; certain appeals treated as motions to remand, and denied.

1. Bankruptcy 60

Debtor's filing petition in California state court for judicial supervision of dissolution amounted to having procured, permitted or suffered "appointment of a receiver or trustee" within Bankruptcy Act, where effect of debtor's actions was to require its board of directors, under court supervision, to act as trustees: there was no need for board of directors to be formally appointed trustees or to formally possess legal title to corporation's assets. Bankr. Act, § 3, sub. a(5), 11 U.S.C.A. § 21(a)(5); West's Ann. Cal.Corp.Code, §§ 811, 4605, 4607-4611, 4614, 4616, 4617, 4800, 4801, 5000; West's Ann.Code Civ.Proc. §§ 564, 565.

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 65

Where debtor is insolvent or unable to pay his debts as they mature, he cannot defeat operation of bankruptcy laws by applying for dissolution under California law. Bankr.Act, § 3, sub. a(5), 11 U.S.C.A. § 21(a)(5); West's Ann.Cal.Corp.Code, §§ 811, 4605, 4607-4611, 4614, 4617, 4800, 4801, 5000; West's Ann.Code Civ.Proc. §§ 564, 565.

3. Bankruptcy 76(1)

Under Bankruptcy Act, intervening creditors took on status of petitioning creditors. Bankr.Act, § 59, sub. f, 11 U.S.C.A. § 95(f).

4. Bankruptcy 76(1)

Where part of judgment provided that property owned by debtor would be sold and proceeds of sale applied to reduce debtor's debt, and dispute arose over manner in which properties were to be appraised prior to sale, this was essentially dispute over manner in which judgment would be satisfied, and could not obscure fact that debtor's liability had already been fixed,

as against contention that claim was contingent as to liability and that creditor therefore had no status to petition for debtor's bankruptcy. Bankr.Act, § 59, sub. b, 11 U.S.C.A. § 95(b).

5. Bankruptcy 76(1)

Where debtor was in default on monthly payments, creditor's claim was not contingent as to liability; it was not necessary that creditor obtain judgment or accelerate due date of balance in order to achieve status of petitioning creditor under Bankruptcy Act. Bankr.Act, § 59, sub. b, 11 U.S.C.A. § 95(b).

6. Bankruptcy 76(1)

Where creditor held promissory note which had fully matured, creditor's claim was not contingent as to liability, for bankruptcy purposes, though there was dispute over indebtedness on another separate obligation to same creditor. Bankr.Act § 59, sub. b, 11 U.S.C.A. § 95(b).

7. Bankruptcy 93

Where debtor did not dispute that it had filed petition for judicial supervision of dissolution in state court but only disputed legal effect, debtor was not entitled to jury trial, in bankruptcy proceeding, on that issue. Bankr.Act, § 19, sub. a, 11 U.S.C.A. § 42(a).

8. Bankruptcy 94

In view of debtor's tangled financial affairs and duplication of those problems in two subsidiary corporations that had been merged into debtor three days before debtor's filing petition in state court for judicial supervision of dissolution, there was no abuse of discretion in reference to special master. Fed.Rules Civ.Proc. rule 53(b), 28 U.S.C.A.; Bankr.Act, § 19, sub. a, 11 U.S.C.A. § 42(a); Bankruptcy Gen. Order 37, 28 U.S.C.A.; Bankruptcy Rules, rule 513, 28 U.S.C.A.

9. Bankruptcy 94

Whether there was to be reference to special master was matter for district judge's determination in light of his perception of whether jury would find issue complicated, and debtor's request to examine special master on complexity of bankruptcy case was properly denied. Fed.Rules Civ.Proc. rule 53(b), 28 U.S.C.A.; Bankr.Act, § 19, sub. a, 11 U.S.C.A. § 42(a).

10. Bankruptcy 95

In providing that findings of special master are admissible as evidence and may be read to jury, rule did not require special master to personally read findings to jury, and it was not necessary that special master in bankruptcy case be made available for cross-examination on procedures used to reach findings presented to jury. Fed.Rules Civ.Proc. rule 53(e)(3), 28 U.S.C.A.; Bankr. Act, § 19, sub. a, 11 U.S.C.A. § 42(a).

11. Bankruptcy 94

Debtor in bankruptcy case was not prejudiced by fact that special master happened to be federal bankruptcy referee. Fed. Rules Civ.Proc. rule 53(b)(e)(3), 28 U.S.C.A.; Bankr.Act § 19, sub. a, 11 U.S.C.A. § 42(a).

12. Bankruptcy 93

Debtor's statutory right to jury trial under Bankruptcy Act gave it no greater rights than those available in civil proceedings governed by Seventh Amendment, and procedures employed by trial court, in making reference to special master and in allowing findings of special master to be read to jury, did not impermissibly interfere with Seventh Amendment right to jury trial. Fed.Rules Civ.Proc. rule 53(e)(3), 28 U.S.C.A.; Bankr.Act, § 19, sub. a, 11 U.S.C.A. § 42(a); U.S.C.A.Const. Amend. 7.

13. Bankruptcy 95

Under circumstances of case, including expert qualifications of special master, debtors' full opportunity to introduce evidence which would contradict special master's findings and to argue to jury that findings were incorrect and instructions given to jury on role of special master and weight to be given to his report, debtor received fair and proper trial on question of insolvency. Fed.Rules Civ.Proc. rule 53(e)(3), 28 U.S.C.A.; Bankr.Act, § 19, sub. a, 11 U.S.C.A. § 42(a); U.S.C.A.Const. Amend. 7.

14. Bankruptcy 95

In bankruptcy proceeding, trial judge properly instructed jury by giving "equity" definition of insolvency, following language of statute, and creditor, to show that debtor was "unable to pay debts as they mature" at time of petition for judicially supervised dissolution in state court was not obliged to show debtor's inability to pay "substantially" all of its debts rather than inability to pay one or two or three debts. Bankr. Act, § 3, sub. a(5), 11 U.S.C.A. § 21a(5).

See publication Words and Phrases for other judicial constructions and definitions.

15. Bankruptcy 462

Where appeal from bankruptcy judgment was pending, district court had no jurisdiction to enter order under rule authorizing relief from judgments or orders but rather could at most indicate that it would "entertain" such motion or indicate that it would grant such motion; in such event, debtor's next step would have been to apply to Court of Appeals for remand. Fed. Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

16. Courts 405(12.16), 406.9(2)

District court's ruling that it was inappropriate to either grant or entertain motion for relief from judgment or order was only procedural ruling and not final determination of merits, and

thus was not appealable; "appeal" from such order was therefore considered as motion for remand of case for consideration of the motion. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

17. Federal Civil Procedure 2654

Where bank was not party to bankruptcy proceeding, its actions could not, absent evidence that any of the petitioning creditors knew of any possible irregularities, be charged to any adverse party in the bankruptcy proceeding, and alleged fraud was not a ground for relief from judgment in the bankruptcy proceeding. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

18. Judgment 472

Creditors petitioning for bankruptcy were entitled to rely on presumptive validity of judgment of United States District Court in Texas, absent challenge to its jurisdiction, and debtor's postjudgment collateral attack, in bankruptcy proceeding in United States District Court for.Southern District of California, upon the Texas judgment was brought in the wrong forum, even if it was too late to challenge judgment in the right forum. Fed. Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

19. Federal Civil Procedure 2658

Where all pertinent information that was basis for motion for relief from judgment order should have been known to debtor well before trial on issue of its insolvency, debtor was not entitled to relief from judgment at time of such trial. Fed. Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

20. Federal Civil Procedure 2655

Attempt to reargue primary appeal is not proper function of motion for relief from judgment or order. Fed.Rules Civ. Proc. rule 60(b), 28 U.S.C.A.

21. Courts 405(3.8)

Denial of request for permission to depose witness while appeal from adjudication was pending was appealable order. Fed.Rules Civ.Proc. rule 27(b), 28 U.S.C.A.

22. Federal Civil Procedure 1332

Where movant could not properly have collaterally attacked judgment, motion to take deposition for such purpose was properly denied. Fed.Rules Civ.Proc. rule 27(b), 28 U.S.C.A.

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OPINION

Before KOELSCH and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

WOLLENBERG, District Judge:

Crateo, Inc. a California corporation, was in the business of purchasing "sick" companies. Its own health came into question in late summer of 1970, and its creditors initiated involuntary bankruptcy proceedings. After a jury trial on the question of its ability to pay its debts, Crateo was adjudicated a bankrupt. While appeal from that judgment was pending, Crateo requested permission from the trial court to take depositions pursuant to Rule 27(b) of the Federal Rules of Civil Procedure. While its original appeal was still pending, Crateo also filed in the trial court two motions to vacate the adjudication of bankruptcy under Rule 60(b) of the Federal Rules of Civil Procedure. Appeals

* Honorable Albert C. Wollenberg, United States District Judge, Northern District of California, sitting by designation.

from the denial of all three post-judgment motions were consolidated with the primary appeal.[1] Finding no merit in any of appellant's arguments, we affirm the adjudication of bankruptcy and decline to remand the case for any further proceedings.

I. *Adjudication of Bankruptcy*

In the summer of 1970, Crateo elected to wind up its affairs and voluntarily dissolve. On August 31, 1970, it filed a petition for judicial supervision of the winding up process with the Superior Court of the State of California for San Diego County. See California Corporations Code § 4607. On that same day, the Superior Court ordered that notice of the dissolution proceeding be published and that all known creditors of Crateo be informed of the petition. In addition, the Superior Court ordered all creditor actions against Crateo enjoined and required all claims against Crateo to be presented in the dissolution proceedings. See California Corporations Code §§ 4608, 4616. Shortly thereafter, a creditors' petition was filed in the District Court alleging that Crateo had committed the fifth act of bankruptcy as defined by Section 3(a)(5) of the Bankruptcy Act, 11 U.S.C. § 21(a)(5).

In accord with Section 19(a) of the Bankruptcy Act, 11 U.S.C. § 42(a), Crateo requested a jury trial on the question of its insolvency. Prior to that trial, several issues, including the issue of Crateo's insolvency, were referred to the referee in bankruptcy sitting as a special master. The special master's report on the issue of Crateo's insolvency was read to the jury at trial. The jury subsequently found that Crateo was insolvent at the time it filed its petition for dissolution in the state court, and a judgment adjudicating Crateo a bankrupt was entered on August 9, 1973.

1. The appeal from the adjudication of bankruptcy is No. 73-3208. The appeal from the denial of permission to take post-judgment depositions is No. 74-2088. The appeals from the denials of the motions to vacate judgment are Nos. 74-2615 and 75-3061.

Appointment of a Receiver or Trustee

[1] The petitioning creditors alleged that Crateo's petition in the state court for judicial supervision of its dissolution amounted to the fifth act of bankruptcy, 11 U.S.C. § 21(a)(5). That section provides, in pertinent part, that:

> Acts of bankruptcy by a person shall consist of his having . . . (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property.[2]

California law governing the dissolution of corporations creates a significant change in the status of the corporation and its directors. We agree with appellant's creditors and the District Court that the net effect of this change means that Crateo's actions in the state court resulted in the "appointment of a receiver or trustee" within the meaning of 11 U.S.C. § 21(a)(5).

After a petition for dissolution is filed, the board of directors continues to operate the corporation in order to settle its affairs. Cal.Corp.Code § 4800. However, directors may be removed by the superior court for reasons of "dishonesty, misconduct, neglect, or abuse of trust." Cal.Corp.Code § 4614. The court can take such an action on its own initiative, and the normal prerequisite of a shareholder's suit is not required. *Cf.* Cal.Corp. Code § 811.

The duties of the board of directors are also limited once the dissolution proceedings come under judicial supervision. The only business the corporation can carry on is that of winding up. Cal.Corp.Code § 4605. In carrying out this task, the board of directors is invested with extensive powers. Cal.Corp.Code § 4801. The powers of the board of directors, however, are not unlimited. The state court has the specific power to determine

2. The definition of "persons" in 11 U.S.C. § 1(23) makes this section applicable to corporations.

the manner in which claims are to be presented and settled and how shareholders' rights are to be determined. The court has the power to oversee the complete dissolution process and discharge the directors from their obligations after the process is completed. Cal.Corp.Code §§ 4608–11, 4617. In addition, the court has the general power to "make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation." Cal.Corp.Code § 4607.

In winding up the corporation's affairs, the first duty of the board of directors is to satisfy the corporation's debts and liabilities. Cal.Corp.Code § 5000. In satisfying these obligations, the directors' powers under Cal.Corp.Code § 4801 are circumscribed by the overall supervisory power of the Superior Court under Cal.Corp.Code § 4607. If the directors do not settle the corporation's obligations properly, the court has the duty to vacate the directors' actions and make the appropriate settlement itself. *In re Trinity Tractor Co.*, 3 Cal.App.3d 428, 440-441, 83 Cal. Rptr. 783, 791–792 (1970).

In addition, Crateo's creditors could no longer pursue their normal legal remedies against Crateo once the Superior Court accepted Crateo's petition for judicial supervision of its dissolution proceedings. Actions already begun were stayed by the Superior Court's order. Whether or not legal title to the corporation's assets passed into the possession of the board of directors became irrelevant because creditors could sue neither entity.

There was no need for the board of directors to be formally appointed trustees or to formally possess legal title to the corporation's assets. The effect of Crateo's actions in the Superior Court was to require its board of directors, under court supervision, to act as trustees.[3] In determining whether a corporate

3. This result is not changed by the additional possibility that a receiver may be appointed pursuant to California Code of Civil Procedure §§ 564, 565.

dissolution under state law is the equivalent of the fifth act of bankruptcy, "it is the end result that counts." *In re Bonnie Classics*, 116 F.Supp. 646, 648 (S.D.N.Y.1953).[4]

[2] Not every corporate petition for dissolution under the California Corporations Code will necessarily result in an involuntary bankruptcy. Under 11 U.S.C. § 21(a)(5), the creditors must also show that the debtor was "insolvent or unable to pay his debts as they mature." However, if this situation exists, California corporations cannot defeat the operation of the bankruptcy laws by applying for dissolution under California law. *In re Watts & Sachs*, 190 U.S. 1, 27, 23 S.Ct. 718, 47 L.Ed. 933 (1902). The overly technical approach to the interpretation of 11 U.S.C. § 21(a)(5) urged by Crateo must be rejected.

Petitioning Creditors

[3] The creditors' petition against Crateo was required by Section 59(b) of the Bankruptcy Act, 11 U.S.C. § 95(b), to be filed by at least "three or more creditors who have provable

4. *Blair & Co., Inc. v. Foley*, 471 F.2d 178 (2d Cir. 1972), *vacated and remanded for consideration of mootness*, 414 U.S. 212, 94 S.Ct. 405, 38 L.Ed.2d 422 (1973), is not to the contrary. That case involved a private arrangement between a brokerage firm and the New York Stock Exchange for the appointment of a liquidating agent for the firm. No court was involved in the liquidation process nor did the winding up process force creditors to forego their normal legal remedies. In light of the different factual situation herein, we need not comment further on the *Blair* case.

claims not contingent as to liability." Six petitioning creditors[5] presented evidence before the special master, and Crateo claims that none of them had claims "not contingent as to liability." Examination of the creditors' claims, however, shows that appellant is incorrect.

[4] Intermark Investing Inc. was a judgment creditor of Crateo's pursuant to a stipulated judgment entered in a state court prior to the filing of the creditors' petition. Part of the judgment provided that two parcels of property owned by Crateo would be sold and the proceeds of the sale applied to reduce Crateo's debt to Intermark. A dispute arose over the manner in which the properties were to be appraised prior to their sale. This was essentially a dispute over the manner in which the judgment would be satisfied and cannot obscure the fact that Crateo's liability to Intermark had already been fixed. *In re Trimble Co.*, 339 F.2d 838, 844 (3rd Cir. 1964).

[5] Under a promissory note to Olympia Business Service, Inc., Crateo was obligated to pay $1200 per month. Since appellant did not make the payments due July 1, 1970, and August 1, 1970, Olympia was properly determined to be a creditor whose claim was not contingent as to liability. There was no need for Olympia to obtain a judgment against Crateo before it could achieve the status of a petitioning creditor under Section 59(b). *Denham v. Shellman Grain Elevator, Inc.*, 444 F.2d 1376, 1380 (5th Cir. 1971). Whether or not Crateo received proper notice so as to accelerate payment of the entire amount remaining on the promissory note is irrelevant because the two monthly installments were definitely due at the time the creditors' petition was filed.

5. Two of the original petitioning creditors and four intervening creditors presented evidence before the special master on this question. Under 11 U.S.C. § 95(f), the intervening creditors took on the status of petitioning creditors. *3 Collier on Bankruptcy* ¶ 59.29 (14th ed. 1975).

[6] General Electric Company held two promissory notes which had fully matured prior to August 31, 1970. Again, there was no need for General Electric to have obtained judgments on these notes in order to satisfy the requirements of Section 59(b). The fact that there was a dispute over Crateo's indebtedness on another separate obligation to General Electric is irrelevant.[6]

Use of Special Master's Report at Jury Trial

[7] Under Section 19(a) of the Bankruptcy Act, 11 U.S.C. § 42(a), Crateo was entitled to a jury trial "in respect to the question of [its] insolvency."[7] Prior to that trial, the issue of Crateo's insolvency had been referred to the referee in bankruptcy sitting as a special master. The report of the special master was then read to the jury pursuant to Rule 53(e)(3) of the Federal Rules of Civil Procedure. Crateo contends that the procedure followed in this case violated its right to a trial by jury on the question of its insolvency.

[8,9] Crateo first claims that reference to a special master was unwarranted because the issues were readily understandable by a jury. F.R.C.P. Rule 53(b) provides that "in actions to be tried to a jury, a reference shall be made only when the issues

6. While it would not be helpful to discuss the claims of the three other petitioning creditors, we believe the District Court correctly held that their claims were not contingent as to liability.

7. Although 11 U.S.C. § 42(a) also gives debtors the right to a jury trial on the question of whether they committed an act of bankruptcy, there was no need for a jury trial on that issue in this case. Crateo did not dispute the fact that it had filed a petition for judicial supervision of dissolution in the state court. Crateo only disputed the legal effect that would be attached to its action.

are complicated."[8] The petitioning creditors had alleged that Crateo was bankrupt because it could not pay its debts as they matured. While every claim of this type does not require use of a master, considering Crateo's tangled financial affairs and the duplication of those problems in two subsidiary corporations that had been merged into Crateo three days before the filing of the petition in state court for judicial supervision of dissolution, we believe that there was no abuse of discretion in reference to the special master. Since this was a matter for the district judge's determination in light of his perception of whether the jury would find the issue complicated, Crateo's request to examine the special master on the complexity of the case was properly denied.

[10] At the trial, the findings of the special master were read to the jury. In providing that these findings are "admissible as evidence" and "may be read to the jury," Rule 53(e)(3) does not require the special master to personally read the findings to the jury. Consequently, contrary to appellant's position, the special master did not have to be made available for cross examination on the procedures used to reach the findings presented to the jury.

[11-13] The expert qualifications of the special master were Crateo's primary guarantee that the proper legal standards and procedures were used by the master in determining his findings.

8. The trial was held in June of 1973. General Order in Bankruptcy No. 37 was in effect at that time and made Rule 53 of the Federal Rules of Civil Procedure applicable to jury trials in bankruptcy cases. *Cf. Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199 (9th Cir. 1974). The Federal Rules of Civil Procedure with respect to masters now apply to bankruptcy proceedings because of Bankruptcy Rule 513.

In this respect, it is significant that Crateo did not object to the qualifications of the master appointed in this case.[9] At the trial, Crateo was given a full opportunity to introduce evidence that would contradict the findings of the special master and argue to the jury that the findings were incorrect. The jury was instructed on the role of the special master and the weight to be given to his report, and Crateo did not object to this instruction.

The procedures employed in the trial would not impermissibly interfere with the right to trial by jury guaranteed by the Seventh Amendment. *Ex parte Peterson*, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919 (1920); *Burgess v. Williams*, 302 F.2d 91 (4th Cir. 1962). Crateo's statutory right to a jury trial under the Bankruptcy Act gives it no greater rights than those available in civil proceedings governed by the Seventh Amendment. *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199 (9th Cir. 1974). Under all the circumstances of this case, we conclude that Crateo received a fair and proper trial on the question of its insolvency.

Jury Instructions

[14] The petitioning creditors had alleged and were required to prove that Crateo was "unable to pay [its] debts as they mature" when it petitioned for a judicially supervised dissolution in state court. 11 U.S.C. § 21(a)(5). This is the "equity" definition of insolvency. The trial judge's instruction to the jury followed the language of the statute.[10] Crateo objected to this

9. Crateo was not prejudiced by the fact that the special master happened to be a federal bankruptcy referee.

10. The jury was instructed that "considering only those items which you have concluded are both debts and are mature, you must decide whether Crateo, Inc. had the ability to pay these debts on August 31, 1970."

instruction, claiming that the word "debts" is in the plural and therefore the creditor must show the debtor's inability to pay "substantially all" of its debts and not just the debtor's inability to pay "one or two or three" debts.

The words "unable to pay [its] debts as they mature" are contained in a statutory context which necessitates rejection of Crateo's argument. A debtor commits the fifth act of bankruptcy when he is unable to pay his debts as they mature *and* a receiver or trustee is appointed to take charge of his property.[11] In that situation, there is a good possibility that some creditors may not be able to recover their claims on an equitable basis with other creditors unless they are able to invoke the protections of the Bankruptcy Act. Without those protections, the fact that some, or even most, of the creditors could be paid is of little consolation to those who cannot be paid. Adoption of Crateo's position would be completely contrary to the increasing amount of protection afforded to creditors by successive revisions of 11 U.S.C. § 21(a)(5).[12] In addition, Crateo's proposed test would be so indefinite as to be unworkable. The trial judge properly declined to modify his instructions.

II. *Motions to Vacate the Adjudication of Bankruptcy*

[15] Approximately eight months after judgment was entered adjudicating Crateo to be a bankrupt, and while the appeal from the judgment was pending, Crateo filed a motion

11. Thus, contrary to the implications in Crateo's argument, debtors are not thrown into bankruptcy merely because they cannot pay a few small debts at a particular moment.

12. See *1 Collier on Bankruptcy* ¶ 3.501 (14th ed. 1974).

in the District Court to vacate the judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Because of the pending appeal, the District Court had no jurisdiction to enter an order under Rule 60(b). The most the District Court could do was to either indicate that it would "entertain" such a motion or indicate that it would grant such a motion. If appellant had received such an indication, its next step would have been to apply to this Court for a remand. *Canadian Ingersoll-Rand Co. v. Peterson Products*, 350 F.2d 18, 27–28 (9th Cir. 1965).

[16] In this case, however, the District Court found that it was inappropriate to either grant or entertain the Rule 60(b) motion. This was only a procedural ruling and not a final determination of the merits of the Rule 60(b) motion. Such an order is not appealable. Crateo's "appeal" from the District Court's order must therefore be considered as a motion for remand of the case for consideration of the Rule 60(b) motion. *Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963) *cert. denied*, 374 U.S. 753, 83 S.Ct. 1920, 10 L.Ed.2d 1073 (1963); *Canadian Ingersoll-Rand Co. v. Peterson Products, supra*, 350 F.2d at 27 n. 16. We decline to order such a remand.

The basis of Crateo's motion was an attack upon the validity of a judgment from the United States District Court for the Southern District of Texas in favor of the Southern National Bank of Houston and against Crateo. See *Southern National Bank of Houston v. Tri Financial Corporation*, 317 F.Supp. 1173 (S.D.Tex.1970), *affirmed sub nom., Southern National Bank of Houston v. Crateo, Inc.*, 458 F.2d 688 (5th Cir. 1972). This judgment was introduced as evidence tending to prove that Crateo was unable to pay its debts as they matured and comprised a large proportion of Crateo's unpaid debts. In its Rule 60(b) motion, Crateo claimed that the Texas judgment was obtained by fraud and should not have been considered at Crateo's bankruptcy trial.

The District Court in Texas had determined that Tri Financial, a predecessor of Crateo, was obligated to purchase a promissory note from the bank. While that decision was on appeal to the Fifth Circuit, the bank brought an action against one of the signers of the note in the United States District Court for the District of Nevada. After the defendant in the Nevada action raised the claim that her signature on the note had been forged, the bank decided not to prosecute its suit and the case was dismissed. The Fifth Circuit's decision came after the events in Nevada.

[17] The bank, however, was not a party in Crateo's bankruptcy proceeding. The Texas judgment was merely introduced into evidence by other creditors of Crateo as tending to show Crateo was unable to pay its debts as they matured. There is no indication that any of those petitioning creditors knew of any possible irregularities connected with the evidence. Despite Crateo's protestations of fraud in the obtaining of the Texas judgment, its Rule 60(b) motion in this case cannot be considered as falling under the third clause of that section because the bank's actions cannot be charged to any adverse party in the bankruptcy proceeding.[13]

[18] The jurisdiction of the District Court in Texas over the parties in *Southern National Bank of Houston v. Tri Financial Corporation, supra,* was not challenged in the bankruptcy proceedings, and the petitioning creditors were entitled to rely on

13. Assuming that the inability to collect from one of the alleged signers of the promissory note eliminated Tri Financial's obligation to purchase the note from the bank, any possible fraudulent conduct in this situation would consist of the bank not informing the Fifth Circuit of the invalidity of the obligation before it affirmed the judgment of the District Court in Texas.

the judgment's presumptive validity. Crateo's post-judgment collateral attack on the Texas judgment was brought in the wrong forum.[14]

In its Rule 60(b) motion, Crateo also claimed that the bank had received some payments on the promissory note and that Crateo's indebtedness to the bank was therefore less than the amount stated in the Texas judgment. Again, the collateral attack on a presumptively valid judgment was brought in the wrong forum.

[19, 20] We also decline to remand the case because of Crateo's second Rule 60(b) motion. All of the pertinent information that is the basis for this motion should have been known to Crateo well before the 1973 trial on the issue of its insolvency. There is no excuse for waiting over two years after entry of judgment before filing this motion.[15]

III. *Perpetuation of Testimony Pending Appeal*

[21] While the appeal from the adjudication of bankruptcy was pending, Crateo requested permission, pursuant to Rule 27(b)

14. The bank's Nevada action terminated in June of 1971, and the trial on the issue of Crateo's insolvency did not take place until June of 1973. Crateo first raised this issue in early 1974 when it moved for an order perpetuating testimony pending appeal. No satisfactory explanation of the delay in producing evidence of the Nevada action is provided. The possibility that it may have been too late to petition either the Fifth Circuit or the District Court in Texas to set aside their judgments does not allow Crateo to collaterally attack the judgment in this proceeding.

15. Many of the arguments raised by Crateo with respect to these two Rule 60(b) motions are irrelevant to the motions and are attempts to reargue the primary appeal. This is not the proper function of a Rule 60(b) motion.

of the Federal Rules of Civil Procedure, to depose an officer of the Southern National Bank of Houston. This testimony was allegedly needed to investigate the circumstances surrounding the purported forgery on the promissory note and the satisfaction of the note discussed in part II, *supra*. The order denying Crateo's motion is an appealable order. *Ash v. Cort*, 512 F.2d 909 (3rd Cir. 1975). *Cf. Martin v. Reynolds Metals Corporation*, 297 F.2d 49 (9th Cir. 1961).

[22] On appeal, we must decide whether there was an abuse of discretion by the trial court. *Ash v. Cort, supra.* For the reasons stated previously in part II, *supra*, Crateo could not collaterally attack the Texas judgment. There was, therefore, no reason in this bankruptcy proceeding to take depositions on the subject. Crateo's motion was properly denied.

The judgment in No. 73-3208 and the order in No. 74-2088 are affirmed. The appeals in Nos. 74-2615 and 75-3061 are dismissed. Considering Nos. 74-2615 and 75-3061 as motions to remand to permit the district judge to consider appellant's Rule 60(b) motions, the motions are denied.

STATUTES AND RULES

California Corporations Code

§811. Removal of Directors by Superior Court. The superior court of the county where the principal office is located may, at the suit of shareholders holding at least 10 percent of the number of outstanding shares with or without voting rights, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation, and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made a party to such actions.

§4605. Cessation of Business -- Notice of Commencement of Proceedings. When a voluntary proceeding for winding up has commenced, the corporation shall cease to carry on business except to the extent necessary for the beneficial winding up thereof, and except during such period as the board of directors may deem necessary to preserve the corporation's good will or going-concern value pending a sale of its business or assets, or both, in whole or in part. The directors forthwith shall cause written notice of the commencement of the proceeding for voluntary winding up to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation.

§4606. Revocation of Authorization to Wind Up -- Certificate of Revocation -- Execution, Filing and Contents. A voluntary election to wind up and dissolve may be revoked prior to distribution of any assets by the vote or written consent of shareholders or members representing no less than a majority of the voting power, or by resolution of the board of directors if the election was by the directors pursuant to Section 4601. Thereupon a certificate evidencing the revocation shall be subscribed, verified and filed in the manner prescribed by Section 4603.

The certificate shall set forth:

(a) That the corporation has revoked its election to wind up and dissolve.

(b) That no assets have been distributed pursuant to the election.

(c) If the revocation was made by the vote or written consent of shareholders or members, the number of shares or memberships voting for or consenting to the revocation and the total number of outstanding shares or memberships the holders of which were entitled to vote on or consent to the revocation.

(d) If the election and revocation was by resolution of the board of directors it shall be so stated.

§4607. Court Supervision of Voluntary Winding Up -- Protection of Rights of Home Purchases. If a corporation is in the process of voluntary winding up, the superior court of the county in which the principal office of the corporation is located, upon the petition of (a) the corporation, or (b) the holders of 5 percent or more of the number of its outstanding shares, or of (c) three or more creditors, or of (d) three or more persons who have purchased homes from a construction corporation, and upon such notice to the corporation and to other persons interested in the corporation as shareholders or creditors as the court may order, may make orders and adjudge as to any and all matters concerning the winding up of the affairs of the corporation.

If the corporation has, within 18 months prior to the commencement of the proceedings for winding up, been engaged in the business of constructing, or contracting or subcontracting for the construction of buildings for residential use, the court shall, in making orders and adjudging as to matters concerning the winding up, make such provision as it deems reasonably necessary to protect the rights of the purchasers of the homes, including rights which may arise against the corporation for

breach of warranties in connection with the construction. The protection so afforded shall extend to rights which may arise with respect to buildings whose construction was completed within 18 months prior to the commencement of the proceedings for winding up, and the orders and decrees extending the protections shall have a duration of at least 18 months after the filing of the petition but may be made effective for a longer period at the discretion of the court.

§4608. Presentation and Proof of Claims in Court Proceedings -- Notice to Creditors. The jurisdiction of the court includes the presentation and proof of all claims and demands against the corporation, whether due or not yet due, contingent, unliquidated, or sounding only in damages, and the barring from participation of creditors and claimants failing to make and present claims and proofs as required by any order.

All creditors and claimants may be barred from participation in any distribution of the general assets if they fail to make and present claims and proofs within such time as the court may direct, which shall not be less than four nor more than six months after the first publication of notice to creditors unless it appears by affidavit that there are no claims, in which case the time limited may be three months. If it is shown that a claimant did not receive notice because of absence from the State or other cause, the court may allow a claim to be filed or presented at any time before distribution is completed.

Such notice to creditors shall be published not less than once a week for three consecutive weeks in some newspaper of general circulation published in the county in which the principal office is located, or, if there is no such newspaper published in that county, in such newspaper as may be designated by the court, directing creditors and claimants to make and present claims and proofs to the person, at the place, and within the time limited by the order. A copy of the notice shall be mailed to each person shown as a creditor or claimant by the books of the corporation, at his last known address.

Holders of secured claims may prove for the whole debt in order to realize any deficiency. If such creditors fail to present their claims they shall be barred only as to any right to claim against the general assets for any deficiency in the amount realized on their security.

Before any distribution is made the amount of any unmatured, contingent, or disputed claim against the corporation which has been presented and has not been disallowed, or such part of any such claim as the holder would be entitled to if the claim were due, established, or absolute, shall be paid into court and there remain to be paid over to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed with the other assets of the corporation to those entitled thereto, or such other provision for the payment of such claim shall be made as the court may deem adequate. If a creditor whose claim has been allowed but is not yet due consents to the payment of the present value of his claim he shall be entitled to its present value upon distribution.

Suits against the corporation on claims which have been rejected shall be commenced within 30 days after written notice of rejection thereof is given to the claimant.

§4609. Settlement of Claims in Court Proceeding. The jurisdiction of the court includes the settlement or determination of all claims of every nature against the corporation or any of its property, or the amount of money or assets required to be retained to pay or provide for the payment of such claims, or any claim, or the amount of money or assets available for distribution among shareholders from time to time. The court may order the bringing in of new parties as it deems proper for the determination of all questions and matters.

§4610. Judicial Determination of Rights of Shareholders to Assets. The jurisdiction of the court includes the determination of the rights of shareholders and of all classes of shareholders in and to the assets of the corporation.

§4611. Judicial Determination of Accounts of Directors. The jurisdiction of the court includes the presentation and the filing of intermediate and final accounts of the directors and hearings thereon, and the allowance, disallowance, or settlement thereof, and the discharge of the directors from their duties and liabilities.

§4800. Function of Directors in Voluntary Proceedings. When voluntary proceedings for winding up or dissolution of a corporation have been commenced, the board of directors shall continue to act as a board and shall have full powers to wind up and settle its affairs. If the directors have not theretofore elected officers of the corporation pursuant to Section 821, the directors shall elect them and such assistants as the directors deem proper. Any act authorized or approved by a majority of the directors acting as a board is valid and binding as though authorized and consented to by all of the directors.

§5000. Distribution of Assets to Shareholders. After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for, the directors shall distribute all the remaining corporate assets among the shareholders and owners of shares according to their respective rights and preferences. If the winding up is by court proceeding or subject to court supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims which has been prescribed by order of court.

Bankruptcy Act Provisions

§3(5), 11 U.S.C. §21a(5):

Acts of Bankruptcy

(a) Acts of bankruptcy by a person shall consist of his having . . . (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or

involuntarily the appointment of a receiver or trustee to take charge of his property . . .

§19(a), 11 U.S.C. §42a:

Jury Trials

(a) A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury in respect to the question of his insolvency, except as herein otherwise provided, and of any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

§44, 11 U.S.C. §72:

Trustees; creditors' committees; and attorneys

(a) The creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its board of directors or trustees or of other similar controlling bodies, shall at the first meeting of creditors after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify as herein provided, the court shall make the appointment. If the bankrupt is a face-amount certificate company, as defined in section 80a -- 4 of Title 15, the court alone shall make the appointment; but the court shall not make such appointment without first notifying the Securities and Exchange Commission and giving it an opportunity to be heard.

(b) Such creditors may, at their first meeting, also appoint a committee of not less than three creditors, which committee may consult and advise with the trustee in connection with the

administration of the estate, make recommendations to the trustee in the performance of his duties and submit to the court any question affecting the administration of the estate.

(c) An attorney shall not be disqualified to act as attorney for a receiver or trustee merely by reason of his representation of a general creditor. July 1, 1898, c. 541, § 44, 30 Stat. 557; June 22, 1938, c. 575, § 1, 52 Stat. 860; Aug. 22, 1940, c. 686, Title I, § 29(b), 54 Stat. 835.

§59(b), 11 U.S.C. 95b:

Who May File and Dismiss Petitions

. . . (b) Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, or, if all of the creditors of the person are less than twelve in number, then one or more of the creditors whose claim or claims equal that amount, may file a petition to have him adjudged a bankrupt; but the claim or claims, if unliquidated, shall not be counted in computing the number and the aggregate amount of the claims of the creditors joining in the peition, if the court determines that the claim or claims cannot be readily determined or estimated to be sufficient, together with the claims of the other creditors, to aggregate $500, without unduly delaying the decision upon the adjudication.

§63(a), 11 U.S.C. §103a:

Debts Which May Be Proved

(a) Debts of the bankrupt may be proved and allowed against his estate which are founded upon . . .

F.R.C.P. 53:

Masters

(a) Appointment and Compensation. Each district court with the concurrence of a majority of all the judges thereof may

appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referree, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put

witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require

a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

AS amended Feb. 28, 1966, eff. July 1, 1966.

F.R.C.P. 60:

Relief from Judgment or Order

. . . (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.